

No. 9992

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHARLES EVAN FOWLER,

Appellant,

VS.

CALIFORNIA TOLL-BRIDGE AUTHORITY,

Appellee.

BRIEF FOR APPELLEE.

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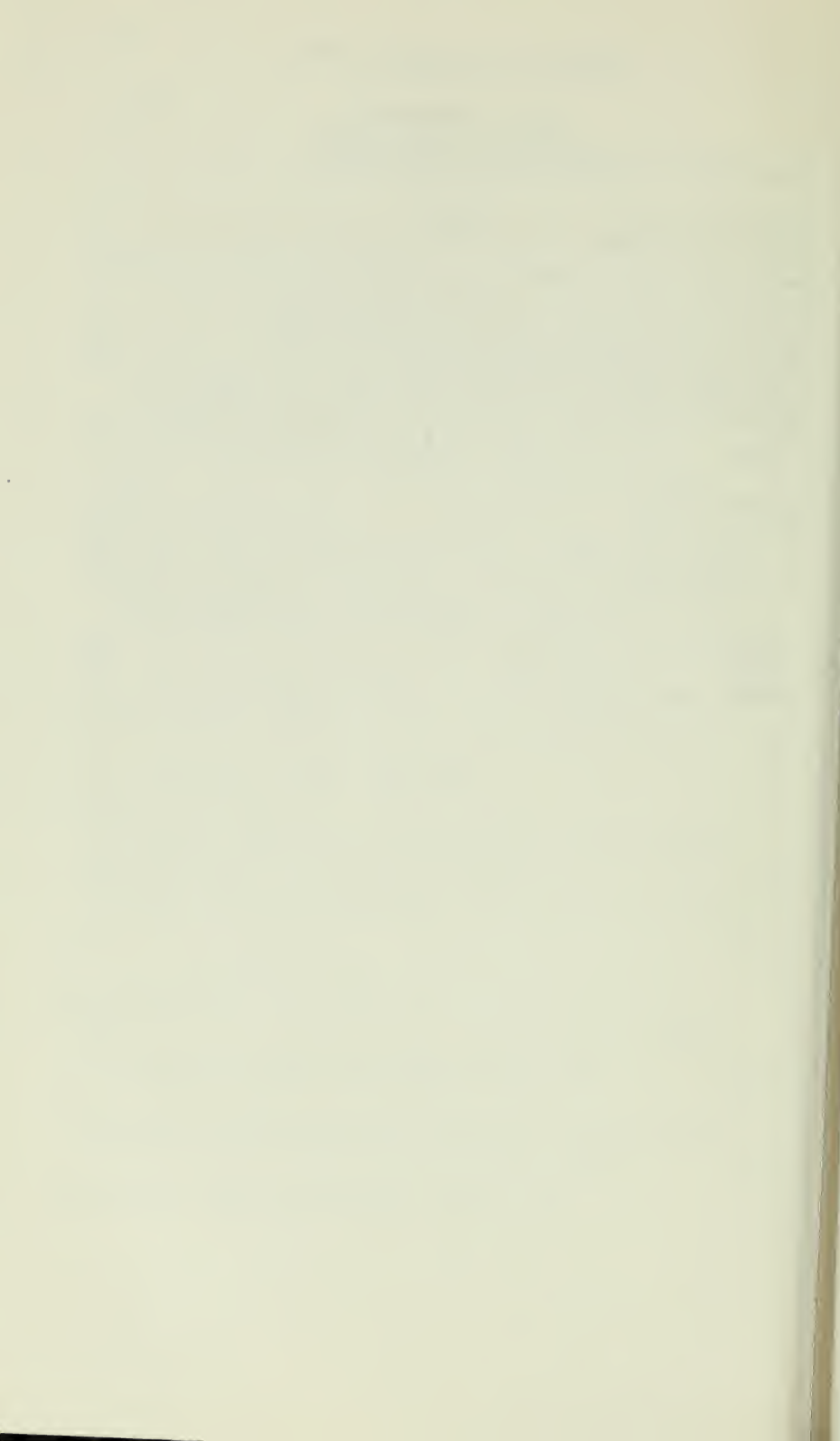
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The appellant specifies three grounds of error. First, that the District Court erred in holding that there was no diversity of citizenship involved. Secondly, that the California Toll-Bridge Authority was in reality the State of California. Third, that the Court did not have jurisdiction over the parties or the subject matter of the cause of action.

Our position is that the District Court was correct in granting our motion to dismiss which is set forth on pages 10 to 18 of the Transcript of Record. We hold that the District Court might have granted our motion on any or all of the grounds which we urged in our memorandum of points and authorities filed with the lower Court.

(Note): Italics ours unless otherwise indicated.

The gist of the amended complaint is that the defendant, California Toll-Bridge Authority (hereinafter referred to as C.T.B.A.), misused the plans and specifications of the plaintiff; that the C.T.B.A. is charged with an appropriation and use of the plans and designs so prepared by the plaintiff; that the Authority used the plans and designs to construct a bridge across the San Francisco Bay and completed it on January 15, 1939. (See Par. V of amended complaint.)

THERE CAN BE NO CLAIM AGAINST THE AUTHORITY.

1. It has no power or authority to acquire or construct a bridge.
2. Its powers are limited almost exclusively to financing.
3. It has no departments or agencies to use the plans or to draft plans or specifications or survey or construct. (Its powers are to direct and authorize the Department of Public Works, which is the State.)
4. None of its officers, agents or employes wrongfully misused plaintiff's plans or designs since it has none.
5. There is no statutory right in favor of the plaintiff to sue the Authority.
6. The misuse, if any, could only have been done by the Department of Public Works of the State of California.

7. The State has not given its consent to be sued upon this kind of claim and particularly upon an implied contract.
8. The Authority can only be sued for a violation of a contract or tort arising out of the misuse or non-use of its limited powers.
9. The Authority is not a corporation in an unlimited sense.
10. The phrase in the Act "may sue or be sued in its own name" has a limitation of meaning.

To understand the full and complete nature of what the C.T.B.A. is, the statute itself must be read carefully. The following is a digest of it:

California Toll-Bridge Authority Act.

Enacted by Chap. 763, Statutes 1929.

Sct. 1. *It is hereby declared to be the policy of the State of California to acquire and own all toll bridges situated upon or along any part of the highways of the State, with the end in view of ultimately eliminating all toll charges thereon.*

Sct. 3. There is hereby created a board to be known as C.T.B.A., composed of the Governor, etc.
 * * * shall serve without compensation * * *
 may sue and be sued in the name of the C.T.B.A.

Sct. 4. The C.T.B.A. shall authorize and direct the Department of Public Works to build toll bridges and other toll highway crossings and

to acquire for and in the name of the State of California toll bridges, etc. * * *

Sct. 5. * * * All such bonds so authorized shall be issued in the name of said C.T.B.A. * * * and that neither the payment of the principal or any part thereof or any interest thereon constitutes a debt, liability or obligation of the State of California.

(This provision is inserted to avoid the effect of Const. prohibitions of creating debt against the State. See Const. Art. XVI. See *Authority v. Kelly*, 218 Cal. 7.)

Amended by Chap. 486, Statutes 1937.

Sct. 6. * * * The C.T.B.A. may contract loans and borrow money through the sale of bonds. * * *

Amended by Chap. 10, Statutes 1933.

Sct. 6.8. * * * The C.T.B.A. may from time to time, upon such terms and conditions in all respects as it may approve and consistently with the provisions of this Act, enter into indentures or agreements containing etc. (Agreements relative to bonds.)

Sct. 6.9. All bonds and income * * * shall be exempt from taxation, except for transfer, inheritance and estate taxes.

Added by Chap. 486, Statutes 1937.

Sct. 7. The C.T.B.A. is hereby empowered to fix the rates of toll and other charges. * * *

Amended by Chap. 10, Statutes 1933.

Sct. 8. The Department of Public Works shall have *full charge of the acquisition and construction* of all such toll bridges and other highway crossings as may be authorized by the C.T.B.A., the operation and maintenance thereof and the collection of tolls thereon. * * *

Chap. 10, Statutes 1933.

Sct. 8½. *The Department of Public Works shall have full charge of the acquisition and construction* of all transportation facilities which may be authorized by the C.T.B.A. * * *

Chap. 288, Statutes 1935.

Sct. 9. The Department of Public Works is hereby authorized and empowered to condemn and take, in fee or otherwise as the C.T.B.A. may determine in the name of the State of California. * * * (It) shall not have the power to commence any such proceedings in eminent domain unless and until the C.T.B.A. shall first have passed a resolution declaring that public interest and necessity require. * * * When the State or any department or governmental agency thereof acquires any existing toll bridge or the real or personal property used in connection therewith, said property shall continue to be subject to taxation by the county, etc. * * *

Chap. 228, Statutes 1935.

Sct. 9½. The Department of Public Works is hereby authorized and empowered to condemn and take, in fee or otherwise, as the C.T.B.A. may determine, in the name of the State of Cali-

fornia, any transportation facilities authorized to be constructed or acquired pursuant to Section 5½ hereof, of any toll bridge or bridges * * * under the provisions of this Act. * * *

Sct. 9¾. The Department of Public Works is hereby authorized and empowered to condemn, possess and take, in fee or otherwise as the C.T.B.A. may determine, in the name of the State of California * * *.

Chap. 228, Statutes 1935.

Sct. 9.8. The Department of Public Works is hereby authorized and empowered to condemn and take in fee or otherwise as the C.T.B.A. may determine in the name of the State of California * * * any real property (for exchange purposes).

Chap. 486, Statutes 1937.

Sct. 11. * * * The C.T.B.A. may enter into a binding agreement with any city, county, etc * * * to repay any money or value of any rights of way * * *.

Chap. 228, Statutes 1935.

Sct. 13. The proceeds from the sale of all bonds authorized under the provisions of this Act shall be paid to the State Treasurer for the credit of the C.T.B.A. * * * and the C.T.B.A. may agree with the purchaser of said bonds upon any conditions or limitations restricting the disbursements of such funds. * * *

All tolls or other revenue * * * shall be paid over by the Department of Public Works at least monthly to the State Treasurer. * * *

Warrants for payments to be made on account of such bonds shall be drawn by the State Controller upon request of the State Treasurer. * * *

Amended by Chap. 486, Statutes 1937.

Sct. 13½. Any provisions * * * Authorizing the issue of bonds * * * shall constitute a contract with the holders of said bonds and be binding upon the C.T.B.A. as long as said bonds may be outstanding.

Chap. 10, Statutes 1933.

Sct. 14. Nothing in this Act shall be construed to prevent the State from making appropriations from time to time. * * *

Chap. 228, Statutes 1935.

Sct. 16. The C.T.B.A. is hereby authorized and empowered to prescribe the terms and conditions * * * (of transportation) * * * is further authorized to grant permits to and enter into contracts with steam, electric, bus, railroad and other transportation companies * * * (it) shall first determine that such permit or contract is advisable or necessary. * * *

Chap. 228, Statutes 1935.

Sct. 16¼. The C.T.B.A. is hereby authorized and empowered to prescribe the terms and conditions upon which any person or firm * * * may

transport any person or property over the additional transportation facilities * * * (it) is hereby further authorized and empowered to contract with respect to the use and operation of such additional transportation facilities. * * *

Chap. 228, Statutes 1935.

Sct. 161½. * * * The C.T.B.A. is authorized and empowered, in behalf of the State of California * * * to operate the transportation facilities of any toll bridge. * * *

Sct. 17. *The Department of Public Works, through its own engineers * * * shall design all bridges to be built under the Authority of this Act.* * * *

Chap. 10, Statutes 1933.

Sct. 18. The C.T.B.A. may authorize the Department of Public Works to acquire * * * tubes and tunnels. * * *

Chap. 763, Statutes 1929.

Sct. 19. When any such toll bridge or bridges * * * is being built by the Department of Public Works, the said Department and/or the C.T.B.A. may carry or cause to be carried such an amount of insurance, etc., as protection against loss or damage as the C.T.B.A. may deem proper. (Casualty Insurance.)

Chap. 10, Statutes 1933.

Sct. 221½. The C.T.B.A. * * * are empowered to do such acts * * * regarding the construction,

maintenance, operation and insurance of such toll bridges * * * (Power of disposal of property or dedicate to public use.) * * * *Any agreement or lease or conveyance herein authorized shall be executed or accepted on behalf of the State of California by the Director of the Department of Public Works.*

Chap. 486, Statutes 1937.

Chap. 24, Statutes 1933, provides authority to C.T.B.A. to fix and collect tolls on the bridge to be constructed from San Francisco to the County of Alameda and repay to the State certain funds advanced to the Authority.

Chap. 5, Statutes 1933.

For the purpose of enabling the Department of Public Works to construct the approaches to a toll bridge to be built over the bay of San Francisco from the City and County of San Francisco to the County of Alameda * * * to acquire all lands, etc. * * * there is hereby appropriated out of any moneys to accrue or be credited to said fund * * * the sum of \$1,650,000 etc. Chap. 6, Statutes 1933. * * * The C.T.B.A. shall pay into the general fund in the State Treasury from the proceeds of the first sale of revenue bonds a sum not in excess of \$65,000.

Chap. 9, Statutes 1933, is an Act directing the Department of Public Works to construct the approaches of S.F.-O.B.B. and requiring their maintenance.

Sct. 3 thereof—The toll bridge and the approaches to it herein directed to be constructed shall be and constitute a primary State Highway and the said toll bridge and structure on the approaches thereto shall at all times during construction be insured against all risks to the *full insurable value thereof for the protection of the State of California.* * * *

Sct. 4. As long as the bonds are outstanding the completed bridge and approaches * * * the Department of Public Works shall permanently maintain and operate the said toll bridge approaches. * * *

POLICING AND TRAFFIC REGULATIONS OF TOLL BRIDGE.

(Provisions of Vehicle Code, State of California.)

Division IXa—vehicular crossing.

Chapter 1—Definitions and general provisions.

605 (a) vehicular crossing means and includes every toll bridge and toll highway crossing and the approaches thereto, *constructed or acquired by the Department of Public Works* under the provisions of the C.T.B.A. Act.

Chap. 847, Statutes 1935.

POINT 1.

THE AUTHORITY HAS NO POWER TO CONSTRUCT
THE BRIDGE.

The building and construction of the bridge is in the Department of Public Works.

See

Sct. 4, Chap. 763, Statutes 1929;

Sct. 8, Chap. 10, Statutes 1933;

Sct. 8½, Chap. 288, Statutes 1935.

It has no power to design or build a bridge.

See Sct. 17, Chap. 10, Statutes 1933, reading, "The Department of Public Works, through its *own engineers* or through such other engineers or experts it may employ, *shall design all bridges* * * *."

All the powers of engineering, the designing, the surveying, the planning as well as construction are not placed in the Authority but by its direction is performed by the Department of Public Works. The Department of Public Works is not a separate entity such as is the Authority, but it is a department of the State and all of its agents, servants and employes are such of the State. The Authority does not survey, lay out or design bridges or approaches; they are surveyed, laid out and designed by the Department of Public Works, which, of course, legally is one and the same thing as the State.

(Toll Bridge Act, Scts. 4, 5, 8, 17 and Pol. Code Sct. 363.)

POINT 2.

ITS POWERS ARE LIMITED ALMOST EXCLUSIVELY
TO FINANCING.

See

Sct. 5, Act 763, Amended Chap. 486, Statutes 1937;

Sct. 5 $\frac{1}{2}$, Enacted by Chap. 228, Statutes 1935;

Sct. 5 $\frac{3}{4}$, Enacted by Chap. 228, Statutes 1935;

Sct. 6, Act 763, Amended Chap. 10, Statutes 1933;

Sct. 6 $\frac{3}{4}$, Act 763, Added by Chap. 486, Statutes 1937;

Sct. 6.8, Act 763, Added by Chap. 486, Statutes 1937;

Sct. 6.9, Act 763, Added by Chap. 486, Statutes 1937;

Sct. 7, Act 763, Amended Chap. 10, Statutes 1933;

Sct. 10, Act 763, Amended Chap. 10, Statutes 1933;

Sct. 11, Act 763, Amended Chap. 228, Statutes 1935;

Sct. 13, Act 763, Amended Chap. 486, Statutes 1937;

Sct. 13 $\frac{3}{4}$, Enacted by Chap. 228, Statutes 1935;

Sct. 22 $\frac{3}{4}$, Enacted by Chap. 10, Statutes 1933.

POINT 3.

IT HAS NO DEPARTMENTS TO SUPPLY PLANS OR SPECIFICATIONS.

Sct. 17, Act 763, Amended Chap. 10, Statutes 1933.

POINT 4.

NONE OF ITS OFFICERS, AGENTS OR EMPLOYES WRONGFULLY MISUSED PLAINTIFF'S PROPERTY.

Certain officers of the State comprise the members of the Authority. They may employ a secretary and such persons as may be necessary to perform its duties. Among its enumerated duties it is not required to build, acquire or construct the San Francisco-Oakland Bay Bridge, nor could it use any plans or drawings. This power lies with the Department of Public Works.

Sct. 3, Act 763, Amended Chap. 401, Statutes 1931;

Sct. 81½, Act 763, Enacted Chap. 228, Statutes 1935;

Sct. 17, Act 763, Amended Chap. 10, Statutes 1933.

Sct. 19, Act 763, Amended Chap. 10, Statutes 1933.

POINT 5.

THERE IS NO STATUTORY RIGHT IN THE PLAINTIFF TO
SUE THE STATE OR THE AUTHORITY.

As stated in *Authority v. Wentworth*, 212 Cal. 298, the statute creates "a public agency of the State" and further, "merely creates a subordinate administrative body to carry out a declared legislative purpose". In *Authority v. Kelly*, 218 Cal. 7, it is said, "Authority is a separate corporation and agency of the State."

The Authority proceeds in the name of and acts for the State of California. The language of the Act indicates that the Authority as a separate entity does not do any of the acts or things which the Department of Public Works does. If the acts of the Department of Public Works are performed as directed by the Authority, since the latter is a department of the State (Pol. Code 363), the injury complained of was done by the State and not by the Authority. There could not be a misuse of the plans because the Authority had no power to use them. And as a matter of fact it is common knowledge as well as judicial knowledge that the bridge was built by the Department of Public Works and not by the C.T.B.A. If the Authority through its members or secretary misappropriated the plans there is no liability. State officers and agencies when acting in such official capacity do not incur separate liability and if any wrongful act is done in the performance of such duties that act is the liability of the State itself.

Wellsbach v. State of California, 206 Cal. 556
at 561.

POINT 6.

THE MISUSE, IF ANY, COULD ONLY HAVE BEEN DONE
BY THE DEPARTMENT OF PUBLIC WORKS.

If there was misuse of the plans and designs as contended, it could not have been done by the defendant. Its powers give it no facilities to make use of any such wrongful appropriation. If the act of pilfering was done by the defendant, it had no facilities to make use of the plans. The only agency which could have utilized the plans must have been the Department of Public Works. The Department of Public Works was and is the State of California.

(Pol. Code 363.)

POINT 7.

THE STATE HAS NOT GIVEN ITS CONSENT TO BE SUED UPON
THIS KIND OF CLAIM AND PARTICULARLY UPON AN IM-
PLIED CONTRACT.

If our contention raised in Point 6 be sound, it must follow that the liability reposes against the State.

It is fundamental that the State may not be sued without its consent.

Gill v. Johnston, 103 Cal. App. 234.

Should consent be given, it may be sued only on the conditions provided by statute.

Crescent Wharf Co. v. Los Angeles, 207 Cal. 430, 278 Pac. 1028.

We urge that the State is the real party in interest in this suit and it may be sued only if it has con-

sented so to be. The only statute consenting to suit is Sec. 688 of the Political Code. It permits actions only upon express contracts or for negligence. It does not create a liability where none exists under some other statute or law but confers only an additional remedy to enforce such otherwise existing liability.

Denning v. State, 123 Cal. 316.

A cause of action for damages arising out of a public work arises upon implied contract.

Crescent Wharf Co. v. Los Angeles, 207 Cal. 430.

In *Berryessa v. Sunset Oil Pac. Co.*, 87 F. (2d) 972, it is held that the State has not given its consent to be sued upon an implied contract. The consent must be clear and definite.

POINT 8.

THE AUTHORITY CAN ONLY BE SUED FOR A BREACH OF CONTRACT OR TORT ARISING OUT OF THE MISUSE OR NON-USE OF ITS LIMITED POWERS.

The liability generally of a corporation is that confined within the scope of its powers. Since the Authority is an entity created by statute it can only be liable for those acts which arise out of or within its functions. If this were a suit for a breach of contract made with its bondholders under its bond indenture it could be sued in its own name for a cause of action created by it. Or, if the Authority violated any lease agreements made by it, it could

be sued. The obligation sought to be established by this amended complaint is clearly outside the scope of defendant's authority.

The C.T.B.A. came into being by statute of 1929. The plans said to be misused were first in existence in 1915.

“The state is as a general rule the source of authority as respects the building of public bridges. * * * The state may exercise its powers directly or may delegate it to governmental agencies.”

11 *C. J. S.*, p. 989.

The powers of a commission for bridge purposes are dependent upon statute creating it.

11 *C. J. S.*, p. 990.

POINT 9.

THE AUTHORITY IS NOT A CORPORATION IN ANY UNLIMITED SENSE.

“Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the State; all other corporations are private.”

This is a statement of the general rule.

“Public corporations under the controlling definition of law are those formed for political and governmental purposes and are vested with political and governmental powers.”

Bettencourt v. State Accident Commission, 175
Cal. 559, 166 Pac. 323.

“Such (Public) corporations are auxiliaries of the government in the important business of municipal rule and their leading object is to promote the public interest. They are public corporations if they possess the attributes thereof, even though the organic statute does not call them corporations.”

6a *Cal. Jur.*, pp. 101-102, par. 33.

The Authority is a public corporation in the sense that it is an auxiliary of the State and from a study of Chapter 763 as amended, its sole purpose and reason for existence was and is to finance the construction of the San Francisco-Oakland Bay Bridge in particular and toll bridges in general. In the enactment of Chapter 763 the policy of the State is to acquire and own all toll bridges to the end of making them free of toll charges. (Sct. 1 of the Act.) The acquisition of property, condemnation proceedings, plans, specifications for building, construction, all such obligations by the Act are vested in the Department of Public Works of the State of California subject to the approval and direction of the C.T.B.A.

It is clear from a reading of the Act that all necessary powers were vested in the Authority by the legislature to establish the necessary financing of the bridge which was specifically intended to be built by the State through its Department of Public Works.

The powers to construct are found in:

Sct. 4, Act 763, Statutes 1929;

Sct. 8, Act 763, Chap. 10, Statutes 1933;

Sct. 8½, Act 763, Chap. 288, Statutes 1935.

The powers to finance are found in:

Sets. 5, 5 $\frac{1}{2}$, 5 $\frac{3}{4}$, 6, 6 $\frac{1}{2}$, 6 $\frac{3}{4}$, 6.8, 7, 10, 11, 13,
13 $\frac{1}{2}$, Statutes 1929, 1933, 1935, 1937.

The general powers are found in:

Sct. 22 $\frac{1}{2}$, Chap. 486, Statutes 1937.

POINT 10.

THE AUTHORITY IS A PUBLIC CORPORATION IN A LIMITED SENSE.

The nature of the authority has been passed upon in two cases by the Supreme Court of the State of California. In *C.T.B.A. v. Wentworth*, 212 Cal. 298:

“The State of California may make appropriations for preliminary expenses necessary for the building or acquiring of any toll-bridge. (Section 14.)

Prior to entering into any contract or granting any permit for the use of any toll-bridge, the Authority must first determine that such an agreement will be for the best interests of the State of California. (Section 16.)

All leases and conveyances connected with bridge operations are to be executed by the Director of the Department of Public Works on behalf of the State of California. (Section 22 $\frac{1}{2}$.)”

In *California Toll Bridge Authority v. Wentworth* (supra), the Court was concerned with legality of an appropriation by the Board of Supervisors of the City and County of San Francisco to the Cali-

fornia Toll Bridge Authority to meet the necessary costs of preparing the surveys and plans for the Bay Bridge. The contention was advanced that the Toll Bridge Authority Act was unconstitutional as an attempt by the legislature to delegate the right to pledge earnings and revenues from State property without the approval of the legislature or the voters of the State. The Court stated that the Act did not have this effect because:

“The Act creating the Toll Bridge Authority, and providing for the cost of the construction of toll bridges through the revenue-bonds method of financing, pledges the earnings and revenue derived from the bridge when erected, as security for the payment of the bonds, without any liability resting on the state, *and merely creates a subordinate administrative body to carry out a declared legislative purpose.*”

In *California Toll Bridge Authority v. Kelly*, 218 Cal. 7, which was a proceeding in mandamus to force the Director of Public Works of the State of California to sign the bonds issued by the Authority, the contention was made that the Toll Bridge Authority could not deposit its funds outside of the State of California for the payment of bond interest because it was not specifically mentioned in Article XI, Section 16½ of the California Constitution. This section provides that “the State * * * or other public or municipal corporation * * * may deposit moneys in any bank or banks outside this State * * *.” The Court held that the Authority would have this power because it was an agency of the State, and said:

*“There can be little question that the California Toll Bridge Authority is an agency of the State. Consequently, all moneys received from the sale of bonds and other tolls and from revenues of the bridge are in the custody of the state. Furthermore, while there is no express reference to the Bridge Authority as being a public corporation, we are satisfied that it is * * *. Where a corporation is composed exclusively of officers of the government having no personal interest in it or with its concerns, and only acting as the organs of the state in effecting a great public improvement, it is a public corporation.”*

The fact that the Authority may be a public corporation does not ipso facto establish diversity of citizenship.

The appellant seems to contend that merely because the C.T.B.A. is a public corporation, it is a citizen of the State of California, and therefore, the Federal Court has jurisdiction on grounds of diversity of citizenship. It is apparent that in making this contention, they assume the answer to the whole problem. We do not contend that the C.T.B.A. is not a public corporation. Our position is, that it is a State agency acting as an arm of the State in carrying out a great public purpose. It is an agency created to serve a governmental necessity and is not functioning in a proprietary capacity in competition with private industry or business. It is not operated to make profit for itself, or its officers or the State. It is a legal instrument to free the State from creating indebted-

ness in order to serve the public in the building and operation of State highways.

“It has been held, however, that corporations performing what are essentially public or governmental functions are in effect part of the government, that actions against such corporations are in effect against the government, and that, in the absence of the sovereign’s consent to suit, *they cannot be sued.*”

It has always been recognized that the sovereign may create corporate agencies as appropriate means of exercising the powers of government.

Keifer & Keifer v. Reconstruction Finance,
306 U. S. 381, 59 Sup. Ct. 516, 83 L. Ed. 784.

See Annotation, Vol. 83 Law Ed., p. 794 at 803
and cases cited.

From an analysis of the above cited annotation it appears that the recent trend of the Federal decisions (as is apparent in the *Keifer* case), seek to deny immunity to suit to most agencies created by Congress. But, the established rules upon this point have not been altered unless the State agency functions in a field apart from governmental service.

The rules for testing the granting or withholding of immunity from suit to a State agency are set forth in the above annotation, page 803 of 83 L. Ed. to page 806.

There is also an adequate review of the recent decisions on the question of suability in *Carver v. Haynes*, 37 Fed. Supp. 607.

The District Court of Oregon held recently in *Pacific Fruit Co. v. Oregon Liquor Control*, 41 Fed. Supp. p. 175, that the test to determine whether a suit is actually brought against the State, so as to require consent of the State to be sued, is contained in the question of *where the weight of judgment if rendered will fall*.

The points urged in the Oregon case are almost identical to our present problem. Appellant places the weight of his position upon the *Keifer* case (supra) and *Pennsylvania Turnpike* case, 34 Fed. Supp. 26. Both of these cases are distinguishable. First, the *Keifer* case, cited with approval in 84 L. Ed. 725, *Federal Housing Administration v. Burr* at page 728 (309 U. S. 245), sets forth the recent doctrine of liberal construction on the right to sue the Federal government. The feature to keep in mind, however, is the construction given by Federal Courts to Federal agencies is not the same doctrine which must apply to a State statute which organizes a State agency. The statutes of California and the cases of the California Supreme Court are not as liberal as Federal principles. Since the C.T.B.A. is an instrument of the State, it is our opinion that the appellant is misleading himself in reliance upon the *Keifer* case to support his contention.

The *Pennsylvania Turnpike* case was determined by the contents and the language of the statute which brought this commission into being. A comparison of the Pennsylvania Act differs widely from the provision of the California statute. It is our opinion

that the *Turnpike* case is not in point. The other cases cited in their brief announce general rules which throw no light upon the determination of this controversy.

Most of the powers given the Pennsylvania Commission are withheld by the California statute and these omitted powers are placed in the Department of Public Works of the State of California.

Important aspects of the question to be decided, is whether or not the C.T.B.A. is so close to the State of California in its origin, functions and purposes, that it must be reviewed as if the State were the nominal party, as well as the real party in interest.

A case on all fours with the present case is *Kansas City Bridge Co. v. Alabama State Bridge Corporation*, 59 Fed. (2d) 48 (C.C.A. 5th, 1932). The question involved is whether or not a suit against the Alabama State Bridge Corporation was in reality a suit against the State of Alabama and therefore not maintainable, since the State cannot be sued. The statute creating the bridge corporation was almost identical with the California Toll Bridge Authority Act. Its officers were State officers. The tolls collected from the operation of the bridge were to be paid into the State Treasury and kept in a separate fund by the State Treasurer for the retirement of bonds. The officers received no compensation in addition to their salaries in their other State capacities. There was a provision that the corporation could sue and be sued. The Court held that the suit was in reality against the State, stating:

“It is clear that the whole purpose of the act was to erect bridges essential to the highway system, to pay for them with tolls, and then to make them free for the use of the public. It is well settled that the construction of public roads and bridges is a governmental function. Dodge County Commissioners v. Chandler, 96 U. S. 205, 24 L. Ed. 625; Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148; 1 Bl. Com. 357; 13 R. C. L. 79. The state may either perform this function in its own name or through its public officers or one of its governmental agencies. Fitts v. McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. Ed. 535; Atkin v. Kansas, supra. The Alabama Bridge Corporation was but an agency or instrumentality through which the state acted in causing its public bridges to be constructed. It was not a private corporation in any sense of the word, but state officials, who might as well have been designated a board or commission, were ex officio members, and the only members, of it. Alabama State Bridge Corp. v. Smith, supra; Clallam County, Wash. v. United States, 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328. In the nature of things the state had to choose some such agency in order to effectuate its purpose. Lane v. Minnesota State Agricultural Society, 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708. The state itself is directly concerned in the construction and maintenance of public roads and bridges, in the same way that it is in its public school system in the maintenance of which it hardly will be doubted that it is performing a governmental function. Alabama Girls’ Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114. Its interest is different from that which it has in its railroad

commission, or governmental subdivisions, such as counties and municipalities, which are given many powers of their own, private as well as governmental. 'It is not enough that the state should have a mere interest in the vindication of her laws, or in their enforcement as affecting the public at large, or as they affect the rights of individuals or corporations, but it must be an interest of value to herself as a distinct entity.' *Railroad Commissioners v. P. & A. R. R. Co.*, 24 Fla. 417, 464, 5 So. 129, 133, 2 L. R. A. 504, 12 Am. St. Rep. 220."

In the case of *State Highway Commission of Arkansas v. Kansas City Bridge Co.*, 81 Fed. (2d) 689, (C.C.A. 8th, 1936), the defendant Highway Commission was sued in the Federal Court on grounds of diversity of citizenship. The Circuit Court of Appeals dismissed the case for lack of jurisdiction because the suit was in reality against the State of Arkansas.

POINT 11.

THE PHRASE IN THE ACT "MAY SUE OR BE SUED IN ITS OWN NAME" HAS A LIMITATION OF MEANING.

The Toll Bridge Act and the provisions of the Political Code with respect to the Department of Public Works and with respect to the liability of the Authority or the State must be construed as a whole, and if any parts of the whole be inconsistent,

these parts must be reconciled. We know of no inconsistencies.

Chap. 736 as Amended, Sets. 667, 668 and 688
of Pol. Code of State of California;
Const. Art. XX, Set. 6 of California.

It seems plain that a proper construction of the Toll Bridge Act results in the conclusion that the California Toll Bridge Authority exercises certain specific functions, as stated in the Act and that the Department of Public Works, acting as a State Department and for and in the name of the State, does certain other acts, among which is the actual planning and constructing of toll bridges and the acquisition of properties necessary therefor. Everything that is done is done for the State. If a liability exists it will be paid out of the State Treasury and by the State when and if the legislature makes an appropriation for the purpose. Therefore, it would appear that the reference to suits in the Toll Bridge Act must be limited to such suits as pertain to the limited functions which the Authority exercises. It is submitted that if any liability exists it is a liability of the State, that the Political Code applies, that consent to such suit has not been given by the sovereign State and that the reference to suits in the Toll Bridge Act pertains to suits of an entirely different nature.

“It is fundamental that the State can be sued only in those cases as to which the legislature has granted permission.”

Section 6 of Article XX of the Constitution reads as follows:

“Suits may be brought against the State in such manner and in such courts as shall be directed by law.”

Section 688 of the Political Code is the only general statute which has been enacted by the legislature authorizing suits against the State. There are some special statutes authorizing actions against the State to quiet title and to recover taxes illegally paid, but Section 688 is the only general statute which permits it.

This section of the Political Code authorizes suits against the State only in two situations: first, suits on express contract, and, second, suits for negligence.

The Courts have held that as to negligence, Section 688 authorizes suits only where other provisions of law impose a liability upon the State. The section gives a remedy when a liability exists, but of itself creates no liability. The only liability for negligence which has been created against the State is that involving the use of motor vehicles under Section 400 of the Vehicle Code.

23 Cal. Jur. 581;

Denning v. State, 123 Cal. 316;

Melvin v. State, 121 Cal. 16;

Chapman v. State, 104 Cal. 690.

The complaint in this action alleges neither express contract nor negligence.

We wish to call the Court's attention to the Validating Act of 1939. (Act 8920, Statutes of 1939, Chap. 593.) It defines the term “public body”, enumerates

many of them and among the last listed is the California Toll Bridge Authority. It is clear then that the legislature established the Authority as a public body to serve the State of California.

We respectfully submit that the lower Court was correct in granting our motion to dismiss.

Dated, San Francisco,
February 25, 1942.

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